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A YEAR BOOK OF RICHARD II.

THE PUBLICATION of a year book[1] in this country is an event for our legal scholarship. The trustees of the Ames Foundation in a spirit that is worthy of the great legal scholar in whose honor the foundation was instituted, have made the publication possible, but it is to be inferred from the Introduction by the Editor that the book was not prepared at their instance. He tells us[2] that he has had, for correcting various inaccuracies, the assistance of certain members of the Harvard law faculty, but it is not to be supposed that they have given a critical reading to this volume, for it would be impossible that certain matters could have escaped their scrutiny.

Yet it is first to be noted that no one can overestimate the amount of labor and even painful drudgery which must go to the preparation of such a volume. To the difficulties (to be surmounted only by great practice) of deciphering manuscripts, caused by dubious and apparently meaningless contractions, and arising from the mistakes, stupidities and ineptitudes not only of the original reporters,[3] it may be, but certainly of the copyists, must be added, in a year book published on the plan of this, the great additional labor of searching for and identifying out of the judgment rolls the records of the various cases. The modest deprecation of anticipated errors by even so great an adept as Maitland, which is shown in his prefaces to his editions of year books, is sufficient warning of the bristling obstacles and pitfalls.

[1] Year Book of 12 Richard II, A. D. 1388, 1389. Edited for the Ames Foundation by George F. Deiser of the Philadelphia Bar, Cambridge, Harvard University Press, 1914. Pp. XXXI, 239.

[2] P. XXXI.

[3] The Editor seems to put credence in the story that there were official reporters for the year books. He certainly is wrong in attributing (Introd. p. VIII) to a year book reporter the "ject un brickbat a le dit justice." This was said as to Chief Justice Richardson who died in 1635 by Chief Justice Treby who died in 1700. It was written on the margin of Dyer's Reports. Foss, Biog. Jurid. 558.

If, therefore, I point to what I consider inaccuracies, oversights and positive errors, it must be considered as said not out of any desire to criticize, but rather in the hope that more year books are coming and that such matters may be rectified, for no one should fail to recognize the courage of the Editor in undertaking so onerous a task.

The first inquiry that occurs is why the reign of Richard II and in particular why the twelfth year was selected. Maitland chose the reign of Edward II. because the rolls series of year books passes over the second Edward's reign. But for Richard II there is no printed year book whatever. This reign had been ignored in the published year books for reasons that are partly accidental. Besides, there were paragraphs out of the abridgements collected by a man who evidently desired, like some modern law writers, to "pirate" his material without any labor. His collection was called Bellewe's Reports, or sometimes more ambitiously, the year books of Richard II.

The time itself, moreover, is one of great interest, as representing an abortive attempt to realize that overmastering kingship, which became an actual fact under the Yorkist and Tudor Kings. The great movements in history are generally preceded by an attempt to attain and a failure to achieve what afterwards by another effort becomes an accomplishment. Richard II is sometimes called an earlier Stuart, but this is a false analogy. He tried to create greater power in the King; he did not seek to retain, as did Charles I, a power which his predecessors had enjoyed. He was an anticipation, not a reminiscence. He represents the attempt of the kingship clogged by the baronage and boroughs to assert a complete control. He failed because the baronage was too strong under the leadership of his uncles and of his crafty and able cousin, Henry of Lancaster. It was not until after the premature flowering of constitutional government under the Lancasterians and the slaughter of the barons in the Wars of the Roses that what has been called the "new monarchy" could eventuate in the iron despotism of the Tudors.

Then, too, the reign presents a first and unsuccessful attempt at what would have been a reformation unsullied by the sordid greed, the savage brutalities of the later reformation. Wickliffe was an abler theologian, a far nobler and purer spirit than Cranmer. Richard II was a far better, far more attractive and abler man than the porcine Henry VIII, but Richard was against the Lollards, while Henry VIII found the reformation an aid to his amorous pursuits. The Church in the last quarter of the thirteen hundreds

was in lamentable case. The long sojourn at Avignon had been ended, but Christendom was rent asunder by rival popes of worthless character hurling at each other the anathemas of the Vicar of Christ.[4] Yet the great movement failed in England under Richard, although under Henry the accidents of politics assured it a complete ascendency.

At this very time, also, legal scholarship on the continent was at a low ebb. Bartolus was dead, leaving no successor. Alciati and Cujas were far in the future, yet in England the great system of the common law was flourishing in undiminished splendor. The coalescence of Anglo-Saxons and Normans, and even of their languages, was marked by the production of our first English classic, the Canterbury Tales, at just this time. The keen and observant eyes of Chaucer looked into the court rooms where some of these very cases were being argued. He knew the leading lawyers and his serjeant "war and wise" was drawn from men like Rickhill or Wadham, whose names fill these reports. The reasons why this reign should be chosen are ample, but they do not seem to have been present in their larger associations to the Editor, at least so far as we can ascertain his reasons from his Introduction.

But when we come to the reasons for choosing this particular twelfth year, I must dissent. The Editor says,[5] "that the present year is happily chosen for a beginning. The bench is new, and the cases seem unmistakably to belong to the year from which they were taken. There is no confusion of counsel and judges with an earlier period." But these considerations are purely formal and if we turn to the Editor's legal calendar for the year,[6] not one of them can be verified; and if the Editor's list of judges for this year is correct, there is a confusion of judges and counsel, which cannot be explained.

In examining this general statement we must premise that in August, 1387, the judges of England, headed by Tresilian, Chief Justice of the King's Bench (but with no puisne, because he had none), had signed certain answers to questions, which declared that the parliament and the lords headed by the Duke of Gloucester and the Earl of Arundel, had been guilty of high treason in establishing a commission to control the King. Bealknap, the Chief Justice of

[4] Gibbon's famous sneer belongs to this period. (Decline and Fall, vol. 6, p. 502.) "Of the three popes John the Twenty-third was the first victim; the most scandalous charges were *suppressed*; the vicar of Christ was *only* accused of piracy, rape, sodomy and incest.

[5] Introduction, p. XXV.

[6] Introduction, p. XXXI.

the Common Pleas, with Fulthorpe, Burgh and Holt,[7] his puisne judges, Cary, Chief Baron and Lokton, the King's Serjeant, then about to be designated as a puisne in the King's Bench to succeed Hannemere, had also signed. Skipwith, a judge in the Common Bench, had excused himself and he was in bad odor and was soon to be superseded. The lords countered quickly. Tresilian was hanged in March, 1388, after a flight. Bealknap, Burgh, Holt, Fulthorpe, Lokton and Cary were banished to Ireland, as a sort of political Botany Bay.[8]

The Editor in his legal calendar for the year gives the twelfth year as beginning June 21, 1388,[9] so that the period covered is from June 22, 1388, to June 22, 1389. For the King's Bench the Editor gives as judges Clopton,[10] Chief Justice, and Hannemere and Lokton, puisne judges. Clopton is correctly given. He had succeeded the fugitive Tresilian, afterwards hanged, on January 31, 1388. But Hannemere had died in 1386. He had been succeeded on October 25, 1387, by John de Lokton, but in March, 1388, Lokton had been banished to Waterford, Ireland.[11] In the year from June, 1388, to June, 1389, there was but one judge in the King's Bench and that was the Chief Justice, Clopton. John Hill and Hugh Hulse, who figure so prominently in these reports as counsel, did not enter the King's Bench until after the Easter term, 1389.[12] It seems no less than extraordinary that the Editor should have missed so notorious a matter, and that he could have included in his King's Bench judges, one dead and one banished man. When the Editor read his own cases he ought to have noticed that there are but four cases in the King's Bench and in each the judge is given as Clopton alone.

Next the Editor gives the judges of the Common Bench as Charlton, Chief Justice, Wadham, Sydenham, Thirning and John Holt, and here he goes further astray. Holt was banished to Ireland in March, 1388, and in the very cases in this book Wadham and Sydenham are acting plainly as counsel arguing numerous cases, Wadham as late as case No. 26 at the Easter term, 1389, and Sydenham as late as case No. 19 at the Hilary term, 1389. These

[7] The Editor omits in his Introduction the names of Fulthorpe and Cary, and he does not notice that Lockton, although he signed, was only the King's Serjeant.

[8] See 1 Howell's State Tr. 119 for the moving petition of the clergy to spare the lives of the judges.

[9] Foss, Judges, vol. 4, p. 1, makes June 22 the date. Foss is correct, for Edward III died on June 21, 1377. In legal contemplation his reign lasted until the end of the day.

[10] Cloptone, the Editor prints.

[11] All these matters can be verified in Foss, Biog. Jurid. sub nom. Hannemere and Lokton.

[12] See Foss, Id. sub nom. John Hill and Hugh Huls or Hulse.

three names among the judges of C. B. are plain and palpable errors, and when he read his cases through the four terms of his twelfth year of Richard II, Trinity and Michaelmas terms of 1388, Hilary and Easter terms of 1389, the Editor ought to have seen that in almost every case the judges are mentioned and they are always but the two, Charlton C. J. and Thirning. Possibly he was misled by Foss, for Foss says that Sydenham and Wadham came on the bench in March, 1388,[13] but Foss is very clearly mistaken. This year book must be the 12 Richard II., for Charlton, appointed January 30, 1388, and Thirning, appointed April 11, 1388, in place of Skipwith retired or removed, are the only judges on the bench. Therefore Wadham and Sydenham, acting as counsel, were not yet appointed, so that Foss, who never had access to this year book, is clearly misled into supposing the Common Bench was filled up with puisne judges as soon as the sitting judges Fulthorpe, Burgh and Holt, were banished.[14]

The fact seems to be that the King would appoint no more than a Chief Justice for the King's Bench, *loco* Tresilian hanged, and a Chief Justice of the Common Bench, *loco* Bealknap banished, and one puisne Thirning, *loco* Skipworth possibly resigned, but more probably removed, because he would not sign the answers of the judges in August, 1387. The King was compelled to have a Chief Justice in each Court and he was willing to appoint Thirning as successor to Skipworth, but he would not appoint successors for Fulthorpe, Burgh and Holt, in the Common Bench, and Lokton in the King's Bench, since he refused to recognize the lawfulness of their impeachment and banishment. So much seems perfectly plain. So the Editor's legal calendar ought to read for the King's Bench Clopton, C. J.; for the Common Bench, Charlton, C. J. and Thirning. If we should go according to the Editor's legal calendar, the cases he has given with the counsel he finds would be left in inextricable confusion. The Editor has forgotten to give the Exchequer Court. There was a Chief Baron Pynchbeck before whom the first two cases are argued, appointed April 24, 1388, to succeed Sir John Cary, who signed the answers and was banished in March, 1388, along with the other judges.[15]

In the names of counsel the Editor shows the most errors. He gives but ten names, a thing absurd in itself, for all the counsel in England; but among those ten are John Cary, the banished Chief

[13] Foss, Judges, vol. 4, p. 14.

[14] Foss could not have made this error if he had seen this year book.

[15] See Foss, Biog. Jurid., sub nom. Cary and Pynchbeck.

Baron, and John Holt, the banished judge. These errors are unpardonable, for no such names actually appear among the counsel in the cases, or could appear.

But it is in regard to the counsel who appear in this year book that the Editor does his strangest work. He ignores Sydenham, a serjeant, who was in numerous cases, and soon to be a judge; he omits Hugh Hulse, soon to be a judge; he misses Clay, a serjeant of five years' standing in great practice;[16] he overlooks Markham, then in large practice, afterwards a judge; he leaves out Cassy in large practice, afterwards Chief Baron; he passes over Penrose and Crosby in active practice; and singularly enough he neglects the great Skrene, then an apprentice, but afterwards a name to conjure with in the later reigns, where his words are quoted in the year books as of authority equal to that of the judges. Such work as this is very bad.

The Editor fails to note one very abnormal thing. At the Easter term Skipwith appears for a party to an action.[17] Who is he? William de Skipwith became, in 1376, a judge of the Common Bench. He sat until August, 1387. He did not sign the answers, but excused himself. He was not impeached in March, 1388, but he then retired from the bench.[18] It is certainly a most curious thing that this judge should appear for a party after he had resigned from the bench. We wonder that it escaped the Editor. There is another peculiar fact. In the first two cases appears a man named Skelton. Those two cases are in the Exchequer Court before Pynchbeck, Chief Baron. Skelton never became a serjeant, nor does he appear in any other court. Evidently he confined his practice to the Court of Exchequer.

We now come to a very singular oversight. The Editor necessarily begins his book with the Trinity term of 1388 and follows with the Michaelmas term of that year, but then (*ecce modo mirum*) follows the Hilary term, 1388, and the Easter term, 1388. Some one, of course, has made an egregious blunder. The terms then as now during a calendar year in order were the four, Hilary, Easter, Trinity and Michaelmas. Hilary term began on St. Hilary's day, January 13, and ended shortly before Easter. Easter term began on the second Tuesday after Easter, which varied, of course, from year to year, and ended May 21. Trinity term began the Tuesday

[16] See list of serjeants in Pulling, Order of the Coif.

[17] P. 40.

[18] Foss, Biog. Jurid., 615. It is barely possible that the later yearbooks of this reign may show another Skipwith. But it is not probable, for he does not appear in the reign of Henry IV, nor was there such a serjeant.

after Trinity Sunday, and ended for the hay time and harvest the latter part of July, and Michaelmas term began on old Michaelmas day, October 12, and ended November 28.[19] These terms are little changed today. In 1914 they were Hilary, January 12 to April 8; Easter, April 21 to May 29; Trinity, June 9 to July 31; Michaelmas, October 12 to December 21. Hence Hilary and Easter terms, 1388, it is needless to say, were in the eleventh year of Richard II and not in the twelfth year at all. The author should have printed at the heads of his pages and as his general headings, Hilary Term of 1389 and Easter Term of 1389, because those are the terms which he has. What he has at the heads of his pages will be confusing for those who have not instant means of correction.

We return now to the author's selection of the twelfth year, and his reasons therefor. His Introduction shows that materials for the seventh year are just as good as for the twelfth. So there could be no preference arising from lack of manuscripts. The eleventh year, June 22, 1387, to June 22, 1388, would have been a poor selection on account of the revolution in the Court. Manuscripts seem to be lacking for the eighth and ninth years. The tenth was perhaps disturbed, but it must have some interesting features. But the year from June 22, 1383, to June 22, 1384, the seventh year of the reign, would have been much better. The very fact of a new court is the great objection to the twelfth year. The courts are inadequately equipped with judges. There are only three judges in the two great courts of England. But this is aggravated by the fact that they are of the dull, stupid sort of men who, it is true, often make quite respectable, plodding judges, for while the really great judge is a rare human being, a very mediocre lawyer on the bench can make a noise that passes for a judicial deliverance.

In the seventh year, however, we would have had in the King's Bench Tresilian and Hannemere. Tresilian was a man of genius and brilliancy, who happened to get on the wrong side in politics, just as his great successor Fortescue did seventy years later. He had courage and power. His very act of coming back in disguise after he had fled shows courage, while his power is manifest from the fact that when he went to try the rioters of Tyler's rebellion, he hanged them in droves, while Bealknap allowed them to break up his court. Hannemere, his puisne in the seventh year, was a man of standing. Outside his ability as a lawyer, he attained the unique distinction of marrying Angharad, the daughter of a prince of Wales, who successfully bore through life the burdensome name

[19] Holdsworth's Hist. Eng. Law, vol. 3, p. 510, quoting Reeves, vol. 1, p. 232.

of Llewellyn Dhu ap Griffith ap Jorweth Voell. His daughter, Margaret Hannemere, married the worthy Owen Glendower, who was so accomplished that he could call "spirits from the vasty deep." Tresilian and Hannemere have at least some human interest compared with a ridiculous creature like Clopton, who retired from the bench to shave his wretched head and become a Minorite friar. Imagine any self respecting lawyer appearing to argue a writ of error in a court where Clopton was "sitting alone in the dark.[20] Clopton's utter lack of standing is proven by the fact that only four cases come from the King's Bench in this whole year book. Evidently his court was deserted and he was a judge only to his tipstaff.

In the Common Bench in the seventh year we would have had Bealknap, Fulthorpe and Skipwith, three highly trained judges. These men reached back for their training to the great period under Parning. Bealknap had a very great and confirmed reputation. He had been Chief Justice since 1374. Not least of all he has human interest as an ancestor of the poet Shelley. Fulthorpe had been serving since 1374. He had been a king's serjeant at the early age of thirty-nine and he was a brilliant lawyer. Skipwith had had a great experience. He was a judge of the Common Bench as early as 1359; he was then Chief Baron; removed in 1365, he had been appointed Chief Justice in Ireland, but had returned to the Common Pleas in 1376, where the year book shows that he was treated with unusual deference. On the other hand, Charlton amounted to nothing, and Thirning was wholly mediocre.[21] One feels far more interested in Bealknap, who was finding recreation in wandering around Drogheda, and in Fulthorpe, who had been condemned to the horrible fate of not going more than three miles from Dublin.[22] I venture the hope that the next year book will be for the seventh year of Richard II, for I feel sure that it will be found far superior to this twelfth year of unrelieved judicial dullness.

But while all of us can express the hope that more year books are coming under the patronage of the Ames Foundation, I am not sure that Mr. Deiser ought to continue his labors as Editor until he has accumulated a far greater knowledge of mediaeval common law. I would do him no wrong, I know nothing of him whatever, and can

[20] Lord Westbury, then Sir Richard Bethell, was once asked why "Crannie" (Lord Cranworth, the Chancellor) sat in the Court of Appeal with other judges and never sat in the Chancellor's Court where he would be alone. Bethell replied: "It is due to a childish indisposition to find himself alone in the dark."

[21] Later in this paper we refer to a case showing the ponderous stupidity of these two judges.

[22] See 1 Howell's State Tr. 119 where Dromore is substituted for Drogheda and the sentences are given.

judge only from this publication. As we have seen, he does not seem to have the requisite historical knowledge. Now it must be said that he does not understand the ordinary terms of Norman English law. As proof I could instance many places not mentioned below, but one is so palpable that it will serve for all. Let us take case No. 24, Hilary term, 12 Richard II. A woman sued a *scire facies* to have execution of a fine made in the third year of Edward III, grandfather (aiel) of King Richard now reigning. She is met by Rickhill for the defendant alleging an older fine made in the thirteenth year of Edward II, great grandfather (besaiel) of King Richard now reigning, and judgment against her upon her default when sued on that older fine and execution issued upon that judgment, and further alleging that the fine under which the woman claims was between (mesne) the making of that older fine, and the rendition of the judgment for execution upon it.

Now this is a very plain matter and the rule of law was that the plea would be good, for it presents an adjudication which is a complete answer to the more recent fine, if it is borne in mind that a fine is nothing but a judgment by consent given in court, limiting lands in the way stated in the judgment or fine. The whole point of the plea is that the fine pleaded by Rickhill is the older one. Yet the translator confuses the whole matter and utterly nonpluses the unwary reader by translating both "aiel" and "besaiel" grandfather; so while the "subtle pleader"[23] Rickhill is asserting his fine to be older than the other fine, the Editor contumeliously charges him with saying that a fine made in the third year of Edward III is older than a fine made in the thirteenth year of Edward II. As a matter of fact, Rickhill says that his older fine was made in the thirteenth year of the great-grandfather (besaiel) of the now reigning King, who was Edward II.

But how can the Editor be ignorant of the meaning of "besaiel"?[24] This is not a printer's error, for twice the word is translated and twice it is given as "grandfather." And why, if the Editor thought about the case, could he not see that his translation made the case unintelligible? Surely we would not expect a palaeontologist to be writing about fossils, if he was likely to confuse a cephalaspis with a giant trilobite. Any man who ventures on the slippery ice of the year books should have, at least, the skates of ordinary knowledge as so to be able to stand upon them and to cut a few of the rudimentary

[23] See Introduction, p. VIII.

[24] In a writ of bisael toward the end of the volume the Editor translates besael, great grandfather. The better spelling of the word is bisael.

figures without attracting the laughter of the spectators. Now every one knows, or ought to know, who has looked into even Reeves' History of English Law, or Pollock and Maitland, or Holdsworth, that the best known actions, the ones that are of the utmost importance as giving rise to the jury system, were the possessory writs or assizes. Of them, given to vindicate the seisin or possession of a dead man, were, first, the original writ of mortdancestor given upon the seisin of the demandant's father, and then the writ of aiel given upon the seisin of the grandfather, and then the writ of besaiel given upon the seisin of the great-grandfather. Yet of these rudimentary facts the Editor seems to have no glimmering of knowledge. But at any rate we know this to be original work. The Editor can at least say of this translation, as Touchstone says of his Audrey: "an ill-favour'd thing, but mine own."

The mistake just instanced is in the text of the year book. But the Editor is equally unfortunate when he ventures into the Latin roll. At the end of the record of the case of Cokefield v. Wawe[25] there is a recital that afterwards (*postea*) on 14 February, 5 Henry IV, the record and process, with all things pertaining thereto, by virtue of a writ of error dated 16 January, 5 Henry IV, directed to William Thirning, are sent into the King's Bench, or as it is officially styled "in the presence of our Lord the King (*coram rege*) wherever he may be in England." Every one at all conversant with the then appellate practice ought to know that the King's Bench by writ of error could review the judgments of the Common Bench. The writ of error was directed to William Thirning because he had then become Chief Justice of the Common Bench.[26] It will be noted that many years had elapsed between the judgment and the writ of error, but the limitation then was very long. Now the above perfectly plain passage the Editor translates (*horresco referens*) thus: "On Feb. 14, 1404 (5 Hen. IV) the record was returned to William Thirning C. J. for the purpose of correcting an error." One can hardly believe one's eyes. Imagine an English judge of that or any day after the lapse of many years changing a record! Surely the Editor must have read the old story of Chief Justice Hengham. And how could the record be returned to the custody of the court which had it? As Shakespeare somewhere sagely observes:

"Cogitation resides not in that man that does not think."

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[25] Y. B. 12 Rich. II, p. 168.

[26] The Editor had gone into this for he shows that he knows that Thirning had become Chief Justice.

Such obvious errors as those just noted are disheartening and I should be glad if I could otherwise commend the translation, but I am compelled to say that in its general tone it is too literal, and in this first sense of literalness I mean not only words translated in their etymological and not their actual equivalents, but also a failure to transform the archaic expressions so far as to make the translation understood by the uncritical reader. The true reason for the translation is to make the meaning as plain as possible. If Horace's "jus et norma loquendi" were translated by the Editor's method, it would become "the law and norm of loquency."[27] As illustrative I take cases at random in the early pages. For instance, while as a technical term we use the phrase tenant in tail with possibility of issue extinct, yet as to claims, demands, interests, and estates we say that they are extinguished; the Editor always translates the word "exteint" literally as "extinct," as in the very first case where it was claimed in the exchequer that a debt owed to a testator by one who became a joint executor, was extinguished (*mes est exteint*), since both executors could not sue the one executor, nor could the one executor sever and sue the other. The learned Wadham made this point but Skelton against him prevailed, quoting Burgh, then banished, as an authority.

There is a curious case No. 10 Trinity term[28] upon the old law of deodand, which forfeits to the king that which causes a death. The roof of an entry in a tin mine caved and killed a workman. The king's escheator claimed the whole mine forfeited as deodand and the king thereupon granted by his letters patent the whole mine. Then the owners of the mine ("certeinz personez qi avoient lour overaigne illoesqz," awkwardly but literally translated," certain persons who had their mine at that place") came into the Chancery representing that only the caved mass was forfeited, not the whole mine. The case shows that the bar was divided into serjeants and apprentices at that time, because the cause was debated between serjeants and justices and apprentices as well. The mine owners got back their mine, called indifferently "overaigne" or "myn," showing how the French word ouvrain and the English word mine were being indifferently used. The patent was recalled; but all through the case the Editor insists on translating repellé (recalled) by the awkward and improper "repealed," which once meant recalled but is no longer so used.

[27] It is somewhat curious that the Oxford dictionary gives loquency but not loquence. The Century, Webster and the Standard give loquence but not loquency.

[28] P. 19.

In another case[29] "verray" meaning "true" is translated "very" in an obsolete sense. In another case[30] in a suit over a church living, Charlton C. J. says the writ of *quare impedit* is like a writ of trespass, but Wadham replies it partakes of the realty, using the strictly legal phrase, "Uncore il est mixt en le realtie," "still it is mixed in (i. e., partakes of the nature of) the realty," and this is translated into the wholly meaningless: "Still it is mixed in reality." A lawyer ought never to be guilty of looking at such a phrase without understanding it.

Passing along, an astounding thing next meets the eye. On looking at page 31 of the book one notices in italics a Latin phrase beginning with the word *prefecturus,* but *prefecturus* is not Latin, while *praefecturus* would be. The phrase reads that when the *nisi prius* trial came on ("et al jour de *nisi prius* en pays vient le defendant en court") the defendant came into Court and put forward a protection because, etc. (et myst avant proteccion qar *prefecturus est in comitiva* B. count de A. par qe le parol fut mys sanz jour.) This seems plain enough and any Latin tutor would severely reprimand a freshman who would not know that *"prefecturus"* was a misprint for *profecturus.* The phrase means that on the day of the *nisi prius* in the country (i. e. at the assizes) the defendant put forward a protection because he is about to depart in the company or service of B. Earl of A., wherefore the parol (the case) was put without day. As we would say he applied for a postponement or continuance on the ground that he was compelled to go away in the service of the Earl of A., and thereupon the case was postponed indefinitely. An alternative reading shows "Count de A." to mean "Count d'Arundell" and therefore the man said that he was about to depart in the service of Richard, Earl of Arundel. This is the great Earl of Arundel, head of the baronage, admiral of England, and the leading spirit of the commission appointed by parliament to control the king and kingdom. Just the year before he had defeated the French in a naval engagement off Margate. It was, of course, a valid ground for postponement of a trial that one was absent in the service of the king or any of his commanders, and the name of the Earl of Arundel must have had an important significance for the Court. But I regret to say that the word *"prefecturus"* is taken as correct and translated by the wholly unknown and impossible "prefect." Thus the Editor translates it: "And on the day of the *nisi*

[29] P. 20.
[30] P. 27.

prius to (*sic,* it ought to be "in") the country, afterward (*sic*)[31] the defendant came into Court and put forward a protection because he is a prefect in the service of B., Earl of Arundel, wherefore the plea was put without day." This is certainly *"Monstrum horrendum, informe, ingens, cui lumen ademptum."* What is a prefect and how would the fact protect the defendant from trial? The other year books show that a protection is an excuse on the ground of a departure from the country on the king's business. It is *vis major* compelling absence. The Editor's whole translation of the passage shows an absolute lack of comprehension of an ordinary and simple matter.

And this is the more incomprehensible because the case was one of deceit, i. e., imposition on the Court by a falsely urged protection. At that day, it seems to be permissible for a party to sue for damages one who, he contends, has obtained a continuance by false statements. The plaintiff in the writ of deceit says that the defendant did not go afterward and hence he lied when he said that he was going to go. The defendant is pleading to this and justifying by saying that what he said to the Court was that he was *about to depart* (here the phrase again occurs *"prefecturus est"* which the Editor again translates by the meaningless "prefect",) and that the Earl had not yet gone on his journey, (or more probably, since he was admiral of the fleet, voyage), "le count ne fuit uncore alé en viagge". Here again we have the Editor with his "repealed" for the proper word "recalled", in speaking of the protection which had been repellé. How was it possible for the Editor to read the rest of this case and not see that his reading *prefecturus* was irreconcilable with the context?

The above is an instance where the Editor was shunted to a side track and ditched by misreading probably the manuscript, but we come now to a place where he totally misunderstands the issue in a very simple case. On page 81 is the case of a writ of debt upon a bond. The bond was conditioned that if the obligor, the defendant, paid certain moneys on a certain day stated (compris) in the bond at a certain place and also if the obligor delivered to Christien T. (a woman) certain goods on a certain day, then the obligation should be void (perdra sa force).

Serjeant Clay for the defendant pleaded, as to the moneys first, payment of the moneys to the plaintiff; as to the goods to be delivered to Christina (Cristien) he pleaded, second, that *she,* the woman,

[31] "Afterward" makes the phrase nonsense. The word is not in the text at all. The Editor evolved this out of his own head. The text says that on the day of the trial he put forward his protection. What good could it do him to put it forward afterward?

not a party to the bond, "by her deed released to us all manner of personal demands and claims" ("ele relessa a nous par son fait tous maneres personels demandz et querels").

Wadham, plaintiff's lawyer, could not, of course, deny the woman's deed of release, but, as she was not a party to the sealed bond, but only at most a partial beneficiary under the bond, he replied: "I know well that since the condition was that he (the obligor) would deliver the goods to the woman, this is no pleading to plead a release and it ought to be that he (the obligor) delivered, but we say that *he* (the obligee) did not release by this deed", "*il* ne relessa pas par ceo fait". Wadham means to say that he does not desire any one to suppose that he does not know that a release of claims and demands is not a good answer to show goods delivered, but nevertheless he will plead something better. Now the whole point here is that the woman being merely the beneficiary and not a party to the bond, could not by her deed of release, release the obligation, since that ran to the man. Yet the Editor, not understanding, has translated "*il* ne relessa pas", by "*she* did not release", thus converting "il" (meaning he) into "ele" or "elle" (meaning she), and making the learned and astute Wadham's clear statement sound like abject nonsense. This question in another form, whether the beneficiary under a sealed or even unsealed instrument can sue upon it, has filled the reports with cases during even the last hundred years. The translation of this case is clearly due to lack of comprehension by the Editor.

We note that at that time the issue—wholly of law—whether the woman's release was good to release the obligation not running to her but made for her benefit is pleaded as a replication of a fact and issue taken on it to go to a jury. At that time, as we shall show, a demurrer was unknown, and pleas or replications set up matter of law or matter of fact indifferently. But even on this issue and at that time Serjeant Clay, and likewise the judges, were unusually stupid creatures to allow Wadham to "put over" such a raw conclusion of law for a pleading of anything to go to a jury. It may be, however, that the vacuous Charlton and Thirning, finding the law point difficult, thought it had better be decided by a jury, or perhaps Clay thought on such a difficult law point he would rather have the decision of the untutored honest twelve. If it were so, he is acquitted.

We presume that the Editor does not hold himself responsible for mistakes in the transcripts from the records, so we must acquit him

of responsibility for the following in an alleged Latin record:[32] "Predictus Johannes Thomam *that was Perreseruant* Edrychi in servicio ipsius Petri apud Londoniensem nuper retentus." The meaning supposedly is that "the aforesaid John lately retained at London one Thomas, servant of the said Peter Edrich in the service of the said Peter". But the Editor makes himself responsible for the translations and the phrase *a die Paschae in quindecim dies* is continually translated "to Easter in fifteen days" or "from Easter for fifteen days", or "to Easter fifteen days". The correct translation is, of course, the quindene of Easter or the quindene of Holy Trinity, or the quindene of St. Michael, as the case may be. Once at least the phrase is so translated,[33] and we may suppose that the Editor has followed in other places the translation in certain of Blackstone's appendices.

There is a note by the Editor to a case in debt which needs elucidation. An action of debt was brought against an obligor in a bond for twenty pounds and the defendant denied the bond (le fait). The jury found that it was his bond and fixed the damages of plaintiff at twenty shillings. The judgment given was for the twenty pounds, principal of the bond, and for the twenty shillings damages. The note says that "it is worthy of note that the jury tax damages in debt upon an obligation". But the taxing of damages as above is the ordinary thing. The damages are for the detention in lieu of interest. It would be worthy of note, however, if the damages had been taxed and the judgment given formally for the amount of the bond but to be satisfied by payment of the actual damages. This is probably what the Editor has in mind, but the case is directly to the contrary of any such supposition.

There is another note[34] where the Editor observes that the question of "contract or not contract" is still a matter to be tried in the Court Christian. We are surprised to hear this, for a different rule had existed for over two hundred years; and we find that the Editor has mistaken words in the text. It is the question of a *contract of marriage* that goes to the Court Christian. The Editor would have known this if he had applied the doctrine of *noscitur a sociis* to what he saw before him.

Then again in a very great case involving the novel question whether an estate tail with possibility of issue extinct is still a fee in tail or merely a life estate, the Editor by not following better

[32] P. 110. The phrase conjecturally restored is "predictus Johannes Thomam servientem Petri Edrychi in servicio ipsius Petri apud Londoniensem nuper retentus."

[33] P. 122.

[34] P. 75.

readings makes it appear that the worthy Hill, one or the other of the brothers, argues both sides of the question,[35] while his "subtle pleader" Rickhill becomes so exceedingly subtle that he argues on both sides of the case.

It has been said that the Editor translates literally, that is to say, he does not throw his text into a more easily understood modern legal form of speech. I have indicated that in places where help is attempted to aid the reader the help given is as deceptive as the lights of a Cornish wrecker. It must be supposed that this book is not for those skilled in year book reading, but for those who know little about such things. To make many of these cases understood help is clearly needed. Let us take a short case before Charlton and Thirning where they make a foolish decision,[36] but which would not appear so completely preposterous, if an explanation were subjoined.

A prior brought a writ of annuity against a parson for installments of an annuity in arrear, alleging that he and his predecessors had been seized of the annuity for the period of prescription. We can read between the lines here and see how some thrifty prior whose priory owned a church living, had sold it to some parson, for a stated sum per year. The hungry sheep of the parson's flock were to be fed subject to the prior's obtaining his "graft". Later some better prior had cancelled the shameful annuity by a release; for the parson pleaded by Hulse, a deed of release of all actions, real and personal, by reason of any debt reckoned or demandable (*debiti computi*) or of any contract whatsoever between them. The intention evidently was to cancel the annuity, but the scrivener did not know what to call it. The deed was admitted but Rickhill, for the prior, denied that the annuity, of which seisin was pleaded for the prescriptive period, arose out of a contract, with an *absque hoc* as to the parson being unborn at the beginning of the prescriptive period. Hulse is so foolish that he can only say that the annuity was demandable at the time of the release. He seems to have considered the annuity a debt but he evidently had never read Bracton. He seems innocent of any knowledge that even in the former reign a mere annuity as distinct from a rent payable out of something, by Bealknap and the whole court had been considered as arising out of contract, for it is not to be prescribed for as a thing,[37] although the

[35] P. 16. See this case infra and note 52 infra.

[36] P. 135.

[37] Y. B. 49 Edw. III, Hil. plea 9. The absque hoc of Rickhill above is to avoid the ruling of Bealknap.

older law was that it was to be treated as a perpetual rent and seisin of it was to be alleged as at the place where the debtor resided and it could be prescribed for as a corporeal thing.[38] Charlton and Thirning, however, with their usual imperviousness to ideas, held that they could not adjudge the annuity to have arisen out of a contract made before the prescriptive period, and hence they held that the release did not cover the annuity. This case is one of the reasons why I say that Charlton and Thirning are stupid and wooden-witted, mere *cantores formularum,*[39] and they are convicted of not knowing antecedent law and of incapacity to see any legal or theoretical difference between an annuity or agreement to pay a fixed sum per year and a tract of land.

It will be seen that the judgment is given by the court as in a preceding case without any formal demurrer filed, but upon what came to be called afterwards a demurrer in judgment, that is to say, a standing upon the pleadings as they are with a demand for judgment on the pleadings.

This brings us to one of the most interesting of all the questions of translation arising in regard to this volume. The words "demourer", "demourrer", "demurrer", "demurra", demurrant", and other forms either of the noun or verb, are used at least nineteen times and are always translated by the Editor as "demur" or "demurrer" in our modern sense. This we cannot but regard as an error, for the words bear no such meaning. We mean today by a demurrer a formal pleading and the ordinary reader understands it to be an objection in point of law made to another pleading, which says that, admitting the facts alleged in the pleading objected to, they are insufficient to show either a cause of action or a defence. But this is not the meaning the word bore in Richard II's time, as is easily demonstrable from this year book.

We must begin by saying that originally the only pleading in defence was a flat denial. Soon there was introduced in Henry III's reign what were called "exceptions" to all the various kinds of action. These exceptions pleaded reasons or facts why the plaintiff should not have his action or his judgment, and there was no distinction between matter of fact and matter of law,[40] but there was one invariable rule, every exception or plea must begin with a flat

[38] Y. B. 3 Edw. II (Sel. Soc.) 137, 138.

[39] Coke has laid down one burning truth applicable to our Charltons and Thirnings whose tribe doth woefully increase. "Our student shall observe that the knowledge of law is like a deepe weil, out of which each draweth according to the strength of his understanding." Co. Litt. 71b.

[40] 2 Pollock & Maitland 638.

denial. To this day a demurrer at the common law begins, "And the defendant comes and defends the wrong and injury when, etc."[41] The word "defends" is a mistranslation of the word *"defendit,"* which means denies.[42] This curious mistranslation is surpassed by that of the closing phrase of a declaration, *"et inde producit sectam"*, translated "and therefore he brings suit", but which ought to be translated "and thereupon he produces his suit". The translator evidently supposed the pleader was giving a reason for bringing the action. The words, of course, refer to the old production of the suit, the followers, i. e., the witnesses to the cause of action, ready to support plaintiff by a formal oath to prove the cause of action, and the record reads that thereupon, after the counsel had stated the plaintiff's pleading, the plaintiff produces in court his *secta.*

But to return to the general demurrer, ever since the beginning of its use long after the reign of Richard II, it has begun with the general denial quoted above of the facts stated in the declaration, showing its analogy when first introduced to an exception or plea. So in the reign of Edward II a pleader says "the exceptions are to abate the count and there is no need to show our right to one who pleads a bad count."[43] These exceptions are plainly objections of law which would be grounds for the later demurrer.[44]

The original word exception borrowed from the Romanized canon law, still retains its meaning in equity practice where exceptions mean objections to a pleading, although they are objections of law. In this year book in a great case the exception of non-tenure is mentioned,[45] which is, of course, a pleading of fact.

There was another method of proceeding plainly apparent in this year book and that was that the objection, whether a pleading of matter of fact or of law or of both mingled together, was always tried with the court first. If held bad the exception never got on the record at all as this year book shows,[46] but if held good the other side must plead something further or judgment went against the party unable to plead in reply. In Edward I's reign the pro-

[41] See Puterbaugh's Common Law Pleading, 67, from which the profession in Illinois draws its common law forms.

[42] See this year book of Rich. II, p. 167, where at the beginning of a plea the word must be translated by the word "denies."

[43] Y. B. 3 Edw. II (Sel. Soc.) 62.

[44] See an objection of law called an exception, Y. B. 12 Rich. II 53.

[45] Notabeme v. Malore, Y. B. Richard II, 131.

[46] See case No. 9, Trinity term, p. 19, which shows by the words of the court that such was the practice. It should be noted, too, that these holdings of the Court are never considered adjudications. The word adjudication, agarde, as it is usually called, is reserved for an actual ruling upon a pleading which the party pleading stands upon (demurs) and refuses to plead further,—a ruling eventuating in a judgment.

fession tried to get some control over the court so that they could get a plea or objection, called indifferently an exception, into the record, although the court held it bad, thus insuring its consideration on a writ of error. So the famous statute of Westminster II, cap. 31, was passed, which has been the most misunderstood statute in English history. It provides (correctly translated):[47]

"When one impleaded before any justices proposes an exception and asks that the justices allow it, if the justices will not allow it, he who proposes the exception shall write that exception and ask that the justices affix seals in witness, and the justices shall affix their seals, and if one will not, another of the company shall. And if perchance upon complaint of the act of the justices the King shall cause the record to come before him, and if that exception shall not be found on the roll and the one complaining shall show the exception written with the seal of a justice affixed, the justice shall be required to appear at a day certain for admitting or denying his seal. And if the justice cannot deny his seal, it shall be proceeded to judgment on that exception according as it ought to be admitted or quashed."

It is perfectly apparent that the statute in speaking of the allowance of an exception does not mean what we now mean by an exception taken in the course of a trial, nor did the word then have such a meaning, because the thing did not exist. Coke seems to have some idea of this, for he says:[48] "Now the mischief before the statute was that when (a party) did offer to allege any exception (as in those days they did in terms at the bar) praying the judges to allow it, and the justices overruling it, so it was never entered of record; this the party could not assign for error." Yet in the next breath he wanders off by saying that the statute applies, as it did in his day, to all pleas, challenges of jurors, and any material evidence overruled.

Now conceding, as it must be conceded, that there was then no jury trial, that no evidence was adduced to the jury, that they were given no instructions, that they merely performed the witness function themselves of stating the fact or facts to the Court,[49] and looking to the words of the statute which show conclusively that they refer only to a disallowed pleading which would otherwise never get on the record, it is plain that the ordinary historical folly of Blackstone and Tidd to the effect that this statute provided for a

[47] The translation in Pickering's Statutes can be reasonably criticized.

[48] 2 Inst. 426.

[49] See Thayer, Prelim. Treatise, passim.

bill of exceptions, is monumentally absurd. As a matter of fact, the word exception changed its meaning from that of an objection or plea offered to that of a reservation of an objection to a ruling of the court.

But this statute was wholly useless. It never had any effect, for the rule was that a party could plead but one defence. If he pleaded double the court would not allow his pleading. If he pleaded anything else, after he had tried one exception unsuccessfully, he waived what he had pleaded, so the whole statute came to naught. Long afterwards it was refurbished to give a bill of exceptions, but it had no more application to a bill of exceptions than would a verse of the Koran.

This original and correct use of the word exception is wrapped up with the correct meaning of the word demur or demurrer at this early date. If a party tried his plea or objection, i. e., his exception, with the court, and he said that he stood upon it, he used the word demur, which means not an objection made by a party demurring to a pleading of the other side, but is the announcement of a party that he stands or is willing to stand upon the pleading which he had pleaded, and he asks for judgment upon the pleadings as they stand. Long after this time of Richard II, when written pleadings came in and with them a written demurrer, a party pleaded a demurrer at his peril, and, if he pleaded a demurrer, he failed or won on his point of law, but in either case judgment went upon the demurrer just as much as if it were a final pleading of fact or a verdict.[50]

Coke shows how this whole confusion arose.[51] In his time the new demurrer as a pleading is in full vigor, but he had no knowledge of the situation when the formal demurrer and a joinder in demurrer were unknown. He confuses "demurred in judgment" with a formal general demurrer. He is so deluded as to suppose that a man can traverse certain facts alleged in the declaration, and then, assuming his traverse to be true as of facts actually pleaded, can on the basis of such assumption demur to the declaration by concluding his traverse with a demurrer.[52] What he confuses is a plea on which the pleader stands demanding judgment (demurring in judgment) and the formal demurrer as he understood it. Coke's confusion also

[50] It has even been said erroneously that a judgment upon demurrer is res adjudicata as to the facts admitted by the demurrer.

[51] Co. Litt. 71b.

[52] Co. Litt. 71b. If this had been true there would never have been such a science as special pleading. Even in equity the general demurrer contained in an answer is not supported by the answer.

indicates why it was that the lawyers preceding his time, on account of this confusion between demurring in judgment and a written demurrer to a pleading, had been so misguided as to evolve the rule that upon demurrer filed, judgment must go for the one or the other party, without any opportunity to withdraw the demurrer and plead over. Blackstone and Tidd, of course, blindly follow Coke, and it all shows *porro unum est necessarium* in legal history, and that is to question all of Coke's assertions.

The facts which I have stated above show that the Editor's translation of the French word demurrer by the word demur in its modern sense is thoroughly incorrect and actively misleading. Maitland in his first year book, recognizing the obvious meaning, translates the word demurrer by the word abide. For instance, a pleader says "nous demorrons en judgment sur ceo," which is translated by the words, "we will abide in judgment upon that."[53] Many other instances may be cited. The common phrase, the parol demurs, means that the pleading stops or waits. The original meaning of demur is to wait, and from this is the derived meaning to stop or to stand or to abide.[54] But the very instances in this year book show the fact. In one case[55] Markham for the defendant stated his defence. Rickhill stated matter of law defeating the defence, which in our modern method of speech was a demurrer. Then Charlton, the Chief Justice, intimates that Markham's plea is bad unless he pleads further matter. Markham replies with an argument; then the reporter adds, "Et sur ceo Markham demurra longement", which the Editor translates, "And upon this Markham demurred a long time", which is clearly wrong, for the meaning is that upon his plea Markham stood or abided for a long time.

The instructive instances of the use of the word may be divided into two kinds, one class where a pleader states his facts or his law, by way of an exception, and the court inquires, "Will you demur there" i. e, will you stand upon that, and another class where the reporter states that the pleader, who has stated some exception, "did not dare to stand (demur) upon that". In either case it is apparent that what the word means is to stand upon or abide upon, and wherever a pleader actually stands upon his proposition, refusing to go further, the Court at once proceeds to judgment. While it may be true that the actual thing in its essence is what would result

[53] Y. B. 3 Edward II. (Sel. Soc.) 60.

[54] See the Oxford Dictionary sub voce demur. There is no use of the word "demurrer" for a law pleading prior to Edward VI's reign, but the word as an objection in law is as old as Henry VIII's reign, at least.

[55] P. 63.

from a demurrer *ore tenus* by one side or the other, it is apparent that the word demur cannot be correctly used to translate the term, since it is not the person who is demurring orally, who is said to demur, but his opponent.[56]

That the translation of the Editor results in positive incorrectness is apparent from a case.[57] A man brought an action of trespass (trans) *vi et armis* in breaking the house of the plaintiff and taking away his servant. Wadham, confining himself to the allegation of a servant taken, and apparently ignoring the breaking, pleaded for the defendant, (1) that the alleged servant was an infant of four years, and (2) that the defendant found him wandering in the vill. Rickhill objects that the plea is double, the first plea he says being matter of fact, and the other that he found the infant wandering and out of service being matter of law. Let us hope that Rickhill, the Editor's "subtle pleader," never achieved this Dogberrian statement. The court thereupon said that the plea was double. Wadham then chose to rely upon the plea that the alleged servant was only four years of age. Thirning and Charlton rule that this plea is bad, because the case is one at the common law and not under the statute of laborers, whereupon Wadham tendered his other issue that he found the alleged servant wandering, and not in service; the report proceeds, "mez il n'osa pas demurrer sur l' issue, etc., einz dit q' il violleit demurrer en jugement sur l' age le quele il poet estre servaunt ou noun." The Editor translates: "But he did not dare to *demur* upon the issue, etc., but said that he would *demur* in judgment upon the age, whether he could be a servant or not." This is positively meaningless. What possible issue could Wadham demur upon? He must first create the issue by a plea and then it would be for the other side to demur as the ordinary lawyer will understand the word. What the passage means is this: Wadham having tendered the issue that he found the said servant wandering, did not dare to stand (demurrer) upon that issue, but withdrew it and said that he would abide judgment (demurrer en jugement) on the other issue of the age of four years, whether such a person could be a servant or not. The reporter

[56] The instances which may be consulted in this Y. B. 12 Rich. II are pp. 9; 16 (noticed infra); 24; 39 (where the word means delay); 53; 56 (a very plain case); 63 (noticed supra); 84; 107; 123; 142; 155 (and compare the transcript of the record, which proves the point); 157; 165; 170; 180; 184; 193; 196. It is to be said, however, that in other year books the word is translated by the word demur. Y. B. 2 and 3 Edw. II (Sel. Soc.) 26; Y. B. 3 Edw. II (Sel. Soc.) 10, 30, 61, but the sense is plain.

[57] Y. B. 12 Rich. II 16.

[58] The translation here confuses the point by a prodigal and indiscriminate use of the pronoun.

adds: "I think he did so because that was the better matter to stand upon."

Many interesting matters could be noted from this year book. The Editor in his Introduction in a most interesting way has drawn attention to certain matters of dramatic interest and historical value, but a lawyer will be most interested in the kind of lawyers our predecessors in this remote time appear to be. There is one case which involves a great number of the bar. It may perhaps suggest that some of the lawyers are giving opinions as *amici curiae,* for on one side are Crosby, Hulse, Woderuf, Clay, Rickhill and Markham; on the other side appear Wadham, Brynchesley, John Hill, Robert Hill and Cassy. The case involves the question whether tenant in tail with possibility of issue extinct is a life tenant or holds a fee tail. Land had been limited to a husband and wife and the heirs between the two begotten. The husband was dead and there was no issue. The question was, could the wife pray successfully the aid of the reversioner or remainderman in fee. If she had a fee tail, she could not. If she held a life estate, she could.

It is plain that these men are all precedent lawyers, looking at the law solely from its remedial standpoint. Thus Crosby, trying to distinguish this situation from the case where both husband and wife were living, in which case it was admitted that there was a fee tail, said, since the husband was dead without issue, the wife's estate is diminished, for the reversioner (or remainderman) can enter if the wife alien, but he cannot enter if both husband and wife are living and alien, hence her estate must be diminished upon her husband's death. Then he supposes a case where a feoffor enfeoffs a feoffee in fee upon condition that if the feoffor pays a certain sum to the feoffee by a day certain, the feoffee shall have an estate for life. Here he claims the feoffee after the money paid can have the aid, because his estate is diminished to a life estate by the condition performed.

But Wadham counters by saying: Yes, in the latter case the condition *is* performed, but in the case of the wife, the condition *has not* been performed, going back to the days before De Donis, when a fee tail was a conditional fee, that is to say, a fee upon condition of having heirs of the body, when the estate became a fee simple by having such heirs. Then he proposes the startling proposition that here there is no extinguishment of possibility of issue because the wife may be enceinte even three years after her husband's death. He says further that since you cannot make the wife here attorn to the reversioner or remainderman in fee, and since she

is not suable for waste, she cannot be life tenant, she must have a greater estate.

Thirning, J., now interposes and says that since the wife here cannot alien she must be tenant for life, but the reason that you cannot have a writ of waste against her is that there is no such writ given, because that remedy is statutory, given only upon a demise, hence nothing can be asserted based upon her non-liability to waste. But Wadham answers denying Thirning's law as to the reason why a writ of waste is not given, and says the writ of waste would be given in the case supposed by Crosby after the feoffor had paid the money and reduced the fee to a life estate and yet, he says to Thirning, the writ of waste is given there not upon a demise. Therefore it is not given against the wife here, because she is tenant in tail. This so disposes of the slow witted Thirning that he ventures no more remarks. Hulse now intervenes with the proposition that at the common law this fee tail as a conditional fee, after the death of husband and issue, would be but a life estate in the wife and so it should be held to be here. Woderuf repeats Hulse's proposition and adds that the wife must have no more than a life estate, because she could not by an action (perhaps he means a fine) render the fee.

Brynchesley, on the other hand, says that if the wife should be ousted she would recover over from the warrantor of her estate, a fee tail and not a life estate, therefore she must have a fee tail. Clay, however, asserts that if the wife be sued for the land and make default after default, nevertheless the reversioner would be received to defend at any time before judgment, hence she must have no more than a life estate. Rickhill now attempts to turn from precedents and remedies to principle. He says that aid is allowed for two reasons, first, to save the right of the reversioner, and there is no inconvenience in this case in granting the aid, because the reversioner is permitted to defend his estate; and then he repeats the argument from the wife's want of power to alien. John Hill now makes certain suppositions which are really *non sequiturs* and Robert Hill[59] says "ditto" to John.[60] Thereupon Cassy says that the wife as tenant in tail has the charters and muniments of title, and she can defend without the aid, and he adds an illustration from

[59] The Editor prints here Rickhill thus making his "subtle pleader" altogether too subtle, for he puts him on both sides of the case. He does the same thing as to one of the Hills by printing Hill for Crosby early in the case. In another case on pp. 35, 36, the Editor has Wadham on both sides.

[60] The words of Robert Hill ought to be translated, "it is the same case" or "on all fours." The Editor gives it "it is all one case."

the fact that if the wife loses the land by a default and brings a higher writ she will lay her estate as being to herself and the heirs of her body, but as the reporters say, query of this, for she could allege her fee tail only to herself and the heirs of her body by a certain person begotten.

By this time the counsel seem to have talked away the day and on another day Rickhill, Clay and Crosby, all for the same side, repeat the same and additional arguments upon the nature of the wife's estate all drawn from the remedies given. And then Charlton, who cites Chief Justice Thorpe in Edward III's time as authority, decides that the wife has a fee tail and not a life estate. Thirning assents, for he seems to have changed his mind. What seems remarkable about the style of argument is that all these lawyers approach the law solely from its remedial aspect. To no one does it occur to argue that the allowing of the reversioner in fee to aid prevents circuity of action and that if the reversioner or remainderman in fee is not permitted to intervene, the wife having only a life interest in fact could fail to defend, and the reversioner would be driven to an action, but placed at a great disadvantage without the muniments of title. Whether the reversioner could in any case sue before the death of the wife, when his estate took effect in possession, is not suggested.

The extreme poverty of the language of the lawyers is apparent. Whether it is due to the fact that they are using a foreign medium of expression or is due to the reporters, must ever remain a mystery. But it would seem that often the counsel have also a poverty of ideas. A case will best illustrate my meaning. In *Say* v. *Kent*[61] a plaintiff brought trespass upon the case against one who had taken certain timber from the plaintiff's bailiff. The plaintiff pleaded that he had ordered his bailiff to seize the timber for rent in arrear under a deed, whereby the father of the plaintiff had conveyed to the predecessor in interest of the defendant certain lands to the said predecessor, his heirs and assigns forever, rendering to the chief lord of the fee the due and accustomed services and rendering also to the plaintiff's father, his heirs and assigns, thirteen shillings and four pence annually as rent, and whereby for the payment of the said rent the said predecessor had bound himself and his heirs and the land granted and other lands, and the deed recited that whensoever the said rent should be in arrear, it should be lawful for the grantor, his heirs and assigns to distrain upon the land and keep

[61] Y. B. 12 Rich. II, p. 7.

the distress until satisfaction of the arrears.[62] The deed contained a general warranty.

Now the question upon this deed was whether it was lawful upon a conveyance in fee simple to reserve to the grantor a rent in fee simple with a right of distress therefor. The only argument Wadham could advance was that since the grantee when he granted the right to distrain, had no interest in the land, i. e., he could gain no interest except by the very deed and livery thereunder, the grant of the right to distrain was void (le graunt ne poet estre de effect.) This point the court overruled, so Wadham pleaded that the land upon which the distress was made was not contained in the deed, and upon this issue was joined, the case went to a jury, the jury found the land to be contained in the deed, and judgment was given for the plaintiff.[63] Wadham would have been correct if the rent had not been theretofore paid, thus giving to the plaintiff a seisin of the rent, which issued out of land.

But in another aspect not suggested this was a very pretty question. The deed attempted to reserve upon a conveyance in fee what could be contended to be a tenure newly created contrary to Quia Emptores,[64] which applied only to conveyances in fee simple,[65] and which forbade any holding by the grantee in a deed except from the chief lord of the fee upon the accustomed services. It could have been said that the reservation of the rent was contrary to the deed in fee, and was contradicted by the very terms of the grantor's warranty and since the grantee of the fee simple must pay an annual perpetual rent enforceable by distress, he must hold to that extent of his grantor. It would have been conceded that if the grantor had attempted to make a reservation of a rent service, the reservation would have been impossible[66] on account of Quia Emptores, why then should a rent charge reserved on a fee simple, which simply substitutes money for services, be any the less inhibited by the statute? As to both seisin was to be alleged and the rent was recoverable as real property. Both were enforceable by distress and both could be sued for by the assize of novel disseisin.

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[62] See the record in Appendix p. 208. In this case, on page 9, Charlton, C. J., says to Wadham who has made a legal objection to the deed: "Advise yourself if you wish to stand upon it or not, for this is to the action and can make an end of the whole case." The Editor, after mistranslating the word "demurrer" by "demur" and inserting "he" where it does not belong, achieves the wholly meaningless, "he can make a fine of the whole."

[63] See the record 12 Rich. II, p. 209.

[64] 18 Edw. I, cap. 1.

[65] Y. B. 21, 22 Edw. I (Rolls series) 641.

[66] Holdsworth's Hist. Eng. Law, vol. 3, p. 126.

On the other hand, it could have been argued that by the deed the grantee was substituted for the grantor to hold of the chief lord by the accustomed services, and he therefore held of the chief lord, and thus the statute of Quia Emptores was satisfied. It was impossible that the grantee should hold also of the grantor. If the land escheated it went to the chief lord of the fee. It was clearly permissible for the grantee after he had received livery of the land to have then granted out of it a rent charge, why should he be prohibited from doing this by the very deed which conveyed the land? This rent charge was confessedly good so far as it bound other lands of the grantor. Then learned counsel could have argued that the non-tenurial character of a rent charge was just as well established as was the tenurial character of a rent service, and to a rent charge the statute had no application.

At any rate those lawyers were so firmly bound by precedent that it never occurred to Wadham to argue that there was no essential difference between a rent service and a rent charge, both issuing out of land and both enforceable by distress on the land, and the comment of some unknown person shows the point to be new, for he puts at the beginning of the case, "note how rent can be reserved at this day upon a feoffment in fee." Wadham's point was ingenious and confined to settled rules, and this debate like the other noted above, certainly justifies the sound advice of Lord Chancellor Bacon: "If a man be not Apt to beat over Matters and to call up one Thing to Prove and Illustrate another, let him study the Lawyers' Cases."

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